

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 8, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2013AP2303-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2011CF556

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES M. BARKLEY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County:
LLOYD CARTER, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. James Barkley appeals from a circuit court order denying his motion to modify his sentence due to new factors. We affirm.

¶2 In 2011, Barkley was convicted of operating while intoxicated (eighth offense) upon his guilty plea. He received a nine-year and two-month

bifurcated sentence. In 2013, Barkley filed a sentence modification motion alleging that the circuit court was unaware of the “harmful side effects” of his simvastatin use, citing a February 2012 Food and Drug Administration drug safety communication highlighting label changes to cholesterol-lowering statin drugs. The revised label states that patients should be aware that “[m]emory loss and confusion have been reported with statin use.” In his sentence modification motion, Barkley argued that at the time of his June 2011 arrest, he was taking a statin and experiencing the side effects of memory loss and confusion. Barkley claimed that his statin use caused him to overdose on another medication and made him “unaware of drinking alcohol and then driving.”

¶3 At a hearing on Barkley’s sentence modification motion, the State noted that in the presentence investigation report, Barkley blamed his confusion upon a prescription mouthwash without offering proof of a connection between the mouthwash and his alleged impairment. The State argued that Barkley was impaired because his blood alcohol content was .266.

¶4 The circuit court noted that Barkley bore the burden of proof to establish a new factor. *State v. Harbor*, 2011 WI 28, ¶36, 333 Wis. 2d 53, 797 N.W.2d 828. A new factor is “a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.” *Id.*, ¶¶40, 52 (citation omitted).

¶5 The circuit court found that at sentencing for his eighth operating while intoxicated offense, Barkley variously contended that prescription mouthwash and/or Methadone caused him to be unaware that he drank and drove.

In support of his new factor claim, Barkley offered only the label change and no evidence of an actual connection between his use of a statin and his mental condition at the time he committed his eighth offense. The court deemed speculative Barkley's claim that the statin impacted his state of mind at the time of the offense.

¶6 We independently determine whether the facts offered by Barkley constituted a new factor. *Id.*, ¶33. We agree with the circuit court that Barkley did not meet his burden to show that his use of a statin constituted a new factor necessitating resentencing.

¶7 Barkley also sought sentence modification on the grounds that the circuit court had discretion to order a mandatory minimum sentence. In so arguing, Barkley relies upon *State v. Williams*, 2013 WI App 74, ¶14, 350 Wis. 2d 311, 833 N.W.2d 846, in which this court held that WIS. STAT. § 346.65(2)(am)6. (2011-12)¹ does not require a mandatory minimum sentence of three years of confinement for seventh, eighth, and ninth operating while intoxicated offenses. The supreme court came to the opposite conclusion about the requirements of the statute when it reversed this court. *State v. Williams*, 2014 WI 64, ¶6, ___ Wis. 2d ___, 852 N.W.2d 467.

¶8 Furthermore, at sentencing, the circuit court made only a passing reference to the three-year mandatory minimum. Rather, the court focused on the gravity of the offense, Barkley's extensive history of operating while intoxicated, considerations of public safety, whether the maximum sentence would be

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

appropriate, and the lack of credibility to Barkley's claim that prescription mouthwash played any role in his offense. The court did not err in declining to modify Barkley's sentence in relation to the three-year mandatory minimum sentence claim.

¶9 Finally, Barkley sought sentence modification on the grounds that he had assisted the Jefferson county district attorney in a criminal investigation involving a 2009 drug-related death in his apartment. "[A] defendant's substantial and important assistance to law enforcement after sentencing may constitute a new factor" for sentence modification purposes. *State v. Doe*, 2005 WI App 68, ¶1, 280 Wis. 2d 731, 697 N.W.2d 101.

¶10 Before she disappeared, the party allegedly responsible for the 2009 death allegedly confessed that she supplied drugs to the victim. The confession occurred during a recorded telephone conversation with Barkley's wife, who was incarcerated at the time of the conversation. Barkley suggested that based on the foregoing, he had assisted law enforcement such that sentence modification was warranted. The circuit court disagreed and later declined to reconsider.

¶11 The circuit court properly denied sentence modification on the basis that Barkley had rendered "substantial and important assistance to law enforcement." At most, Barkley alleged that he was aware that the party allegedly responsible for the drug-related death allegedly confessed to his wife. However, Barkley's wife was incarcerated at the time of the alleged confession, and her conversation with the alleged perpetrator would have been recorded and available to the State in its investigation of the 2009 death. Barkley's showing was insufficient under *Doe*.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5.

